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No. 649

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In the Supreme Court of the United States

OCTOBER TERM, 1959

FARM AND HOME AGENCY, INC., PHILIP H. MEADE, CHESTER R. KOZA, E. BERNIE SHELTON and W. HAROLD HILBERT, PETITIONERS

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

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Opinion Below

The opinion of the Court of Appeals (App. 1a-3a)[1] is reported at 270 F. 2d 891. The District Court did not write an opinion.

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[1] "R. ....." refers to pages of the appendix to petitioners' brief in the Court of Appeals. "App. ....." refers to the appendix to petitioners' brief herein.

Jurisdiction

The judgment of the Court of Appeals was entered on October 7, 1959 (App. 4a). A timely petition for rehearing was denied on November 10, 1959 (App. 5a). The petition for a writ of certiorari was filed on January 19, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Question Presented

Whether a contention that securities of an insurance company are not subject to the provisions of the Securities Act of 1933 should be considered on an appeal from an order of the District Court refusing to vacate a consent decree enjoining violations of the Securities Act in the sale of such securities, where the motion to vacate was made long after the time to appeal had expired.

Statute Involved

Section 22(a) of the Securities Act of 1933, 48 Stat. 74, 86 (as amended, 15 U.S.C. (1952 ed., Supp. V) 77v(a)) provides, in pertinent part:

> The district courts of the United States, and the United States courts of any Territory, shall have jurisdiction of offenses and violations under this subchapter and under the rules and regulations promulgated by the Commission in respect thereto, and, concurrent with State and Territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty created by this subchapter. * * *

Rule 60(b) of the Federal Rules of Civil Procedure is set out at pages 4 and 5 of the petition.

STATEMENT

On April 16, 1958, a final judgment enjoining the petitioners from violating Sections 5(a) and 5(c) of the Securities Act of 1933, 15 U.S.C. 77e(a) and (c), in the sale of capital stock of the petitioner, Farm and Home Agency, Inc., was entered in the United States District Court for the Southern District of Indiana (R. 8-10). The petitioners, who were represented by counsel, consented thereto (R. 10).

On November 20, 1958, the petitioners, represented by different counsel, filed in the District Court a motion for leave to file a motion to vacate and set aside the consent decree (R. 12). They urged, in this motion, that the McCarran-Ferguson Insurance Regulation Act had removed securities issued by insurance companies from the registration requirements of the Securities Act of 1933 (R. 14-21). On December 1, 1958, petitioners filed an ancillary motion for a restraining order seeking to enjoin the Securities and Exchange Commission or persons in active concert with it from investigating, prosecuting, or presenting any evidence to a grand jury pertaining to "alleged violations" of Section 5 of the Securities Act "or any of the matters and things set forth in the Consent Decree of April 16, 1958" (R. 38-42).

After consideration of briefs and oral argument, on the merits of the motion to vacate the District Court on January 12, 1959, entered the following order (R. 44):

> "The defendants' motion for restraining order and motion for leave to file instanter the motion

to vacate and set aside the decree of permanent injunction entered April 16, 1958 and in support thereof, file their brief herewith, being submitted for the consideration of the Court, and the Court being duly advised, now Denies each of said motions."

The Court of Appeals affirmed, stating that the District Court had "jurisdiction to enter the consent judgment" and that its exercise of discretion in denying the motion to vacate that judgment would not be disturbed (App. 3a).

ARGUMENT

The Court of Appeals determined that the substantive issue which petitioners seek to raise respecting the coverage of the Securities Act of 1933 was not before it. This determination was clearly correct and presents no question warranting review by this Court.[2]

As pointed out by the court below, "a motion to vacate a judgment under Rule 60(b) [of the Rules of Civil Procedure] is addressed to the sound legal discretion of the Court" and "its determination will not be disturbed upon appeal except for an abuse of discretion" (Pet. 3a). Where, as here, the original

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[2] The determination, implicit in the original decree of the District Court, that the securities of insurance companies are subject to the registration provisions of the Securities Act of 1933 is also correct. Cf., *Maryland Casualty Co.* v. *Cushing*, 347 U.S. 409, 413; *Securities and Exchange Commission* v. *Variable Annuity Life Insurance Company of America*, 359 U.S. 65; *United States* v. *Sylvanus*, 192 F. 2d 96 (C.A. 7).

decree was entered with the full consent of defendants, who were represented by counsel, vacation of the decree would upset a contract or settlement freely made by the parties with the consent of the Court. Cf. *Walling* v. *Miller*, 138 F. 2d 629, 631 (C.A. 8), quoted in the petition (p. 28). Reversal of the District Court's refusal to vacate, after the time to appeal from the original order has expired, would provide, moreover, an opportunity to appeal in derogation of the provisions governing appellate review.[3] Cf., *Securities and Exchange Commission* v. *Louisiana Public Service Commission*, 353 U.S. 368, 372.

Petitioners' contention seems to be that the foregoing principles are not applicable because of an alleged lack of jurisdiction over the subject matter by the District Court. The complaint, however, charged violations of Section 5 of the Securities Act, and Section 22(a) of that Act, as the Court of Appeals noted (App. 3(a)), "grants to district courts of the United States jurisdiction of 'offenses and violations' under the Securities Act." If the defendants wished to controvert the charge by showing facts from which it might be concluded that the statute did not apply, they had the duty, before the time to appeal had expired, to raise the issue of statutory coverage.[4]

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[3] Rule 73(a) of the Federal Rules of Civil Procedure, which would govern an appeal from an injunction against violation of the Securities Act, provides that, when an agency of the United States is a party, an appeal must be taken within sixty days from the entry of the judgment.

[4] This is fully in accord with the single case cited by petitioner on this point, *Walling* v. *Miller*, *supra*, 138 F. 2d 629 (C.A. 8). There, the Court of Appeals held that, even if the District Court had not been empowered by the Fair

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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General Counsel,

DAVID FERBER,
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THEODORE ZIMMERMAN,
Attorney,
Securities and Exchange Commission.

FEBRUARY 1960.

Labor Standards Act of 1938 to order restitution on complaint of the Administrator of the Wage and Hour Division of the Department of Labor, it had jurisdiction to enter a decree containing provisions for restitution.

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